Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CC Docket No. 98-147
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	
	)	
	)	
And	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association ("USTA") hereby files its reply comments in response to the Commission's *Third Further Notice of Proposed Rulemaking* in CC Docket No. 98-147, and *Sixth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98, released January 19, 2001 ("FNPRM").

USTA does not oppose line sharing or line splitting where ILECs and competitors voluntarily negotiate market driven terms and conditions for the use of ILEC network facilities by competitors providing advanced broadband services. In competitive markets, like the advanced broadband services market, carriers should be free from intrusive Commission regulations that are imposed as substitutes for market driven negotiations. The record shows a continuing increase in consumer broadband choices within and among the various delivery technologies including DSL, cable modems, satellite, fixed wireless, and

mobile wireless. Presently, however, cable modems dominate the provision of broadband services with a 75 percent market share.

USTA does oppose mandatory regulations which require ILECs to unbundle their networks for the benefit of competitors who are provided unprecedented and unlimited rights of use of ILEC network facilities at rates not driven by market forces, but artificially subsidized by ILECs, their customers and shareholders.

The Commission's orders on line sharing and line splitting impose upon ILECs an obligation to unbundle network facilities used to provision advanced broadband services regardless of whether the market for such services is competitive. Under the Commission's rulings, the necessary and impair standard is never a factor in its deliberations on whether ILECs must provide access to unbundled network facilities. The Commission's orders are inconsistent with the requirements of the 1996 Act and the Supreme Court's decision in *AT&T v. Iowa*, 525 U.S. 366 (1999), that the Commission apply the necessary and impair standard in a manner that limits ILEC unbundling only when necessary and when CLECs would be impaired in their ability to provide competing services.

Some parties would require ILECs to provide line sharing in perpetuity. According to these parties, the Commission must impose additional line sharing obligations on ILECs to preserve a competitive market for DSL services. *Joint Comments of Covad, Rhythms, and WorldCom* at 1-4. It is further alleged that ILECs are using the deployment of fiber in their network as a means to delay access by competitors to next generation DSL services. *Id.* at 4; *Sprint Comments* at 1-3. AT&T argues that competitors should have access to the entire loop and "all the attached electronics used to support the provision of transmission

functionality" to facilitate line sharing and line splitting. *AT&T Comments* at ii.[1] These comments ignore prior legal precedents on the necessary and impair analysis regarding ILEC unbundling obligations and limitations on collocation of competitors multifunctional equipment on ILEC premises, and the Commission's own findings that the market for advanced broadband services is competitive. These precedents obviate the need for mandatory line sharing and line splitting regulations.

The proposals in the FNPRM, as supported by some parties, are unnecessary and inappropriate when the market for advanced services is competitive. Extending line sharing to remote terminals and requiring ILECs to provide a UNE data platform is unnecessary and simply provides disincentive for facilities-based competition. The Commission's line sharing orders and the FNPRM simply permit competitors to benefit from the financial risks taken by ILECs to deploy fiber in their networks or use remote terminal access to reach customers.

The stated purpose of the Commission's FNPRM is to facilitate access by competitors to the high frequency portion of the copper loop when ILECs deploy fiber in the loop. Where an ILEC has deployed a fiber digital loop carrier ("DLC") system between the central office and the remote terminal, the Commission's FNPRM proposes several alternative means by which competitors could line share over the feeder portion of the loop. There are significant technical and operational impediments to line sharing under such circumstances. BellSouth observed that the use of a combination voice and data line card by CLECs at

[1] If AT&T is serious about this proposal, they should willingly provide competitors with access to their cable facilities.

ILEC remote terminals to access the high frequency portion of the loop for line sharing is not feasible. The majority of BellSouth's DLCs "are not designed for the use of line cards." *BellSouth Comments* at 2, 3-8. Verizon states that "a line card is not equipment that qualifies for collocation." *Verizon Comments* at 7. As a federal appeals court decision made clear, the Commission's regulations can only permit a competitor to collocate equipment that is necessary for interconnection and access to ILEC UNEs. *GTE v. FCC*, 205 F.3rd 416 (D.C. Cir. 2000). "Line cards are ... precisely the sort of multifunctional equipment providing switching and enhanced services functionality that the D.C. Circuit concluded is not eligible for collocation under section 251(c)(6)." *SBC Comments* at 13.

Any regulation treating the fiber feeder between the ILECs' central office and remote terminal as shared transport and part of unbundled packet switching would be inconsistent with the current definition of shared transport. *BellSouth Comments* at 12-13; *AT&T Comments* at 11 ("use of the fiber feeder to provide transmission functionality between the customers' premises and the central office is not analogous to shared transport."). Access to the fiber feeder between the ILECs' central office and the remote terminal does not meet the definition of shared transport. In Commission regulations, shared transport is defined as transmission facilities shared by more than one carrier, including the ILEC between end office switches, between end office switches and tandem switches, and between tandem switches, in the ILEC network. *Verizon Comments* at 12. Moreover, the Commission has generally declined to unbundle ILEC packet switching technologies. As the Commission stated: "we recognize that the presence of multiple requesting carriers providing service with their own packet switches is probative of whether they are impaired without access to

unbundled packet switching .... we conclude ... that given the nascent nature of the advanced services marketplace, we will not order unbundling of the packet switching functionality as a general matter." *UNE Remand Order*, 15 FCC Rcd at 3835 ¶306. The only exception to the Commission's ruling is when ILECs deploy DSLAMs at remote terminals "they must provide requesting carriers with access to unbundled packet switching." *UNE Remand Order* at 3839 ¶313. Access by a competitor to unbundled packet switching functionality is not available where the competitor can collocate its DSLAM in the ILECs' remote terminal "on the same terms and conditions" that apply to the ILEC. *UNE Remand Order* at 3839 ¶313. The Commission reaffirmed its position in a clarifying order in this proceeding. *Order Clarification*, CC Docket Nos. 98-147, 96-98 (released February 23, 2001)("we clarify that the *Line Sharing Reconsideration Order* does not alter ... the Commission's rules, which describe the limited set of circumstances under which an incumbent LEC is required to provide nondiscriminatory access to unbundled packet switching capability").

As USTA commented, the Commission's proposals in the FNPRM (1) create disincentives for ILECs to invest and innovate, (2) further CLEC dependence on ILEC facilities thereby creating disincentives for CLECs to make investments in their own networks, (3) are protectionist in favor of competitors at the expense of market-based competition that would benefit consumers, and (4) are unnecessary. *USTA Comments* at 1. CLECs are not impaired in their ability to provide advanced, broadband services without access to ILEC UNEs. The Commission has repeatedly concluded that the market for broadband services is competitive. Therefore, continuation of asymmetrical regulation of

providers of competitive broadband services based upon arcane regulatory distinctions distorts market driven competition, while penalizing ILECs who take the financial risks to innovate. The Commission must eliminate asymmetrical regulatory obligations in competitive markets. Functionally equivalent services should receive the same regulatory treatment regardless of the technological platform used to distribute the service. Competitive services should not be regulated. The Commission should forbear from regulating functionally equivalent competitive services. It is time for the Commission to recognize that functionally equivalent services should receive the same non-discriminatory, competitively neutral, regulatory treatment.

According to the Commission's own findings, the market for broadband services is competitive and not dominated by a single provider or technology:

> An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services. Both competitive LECs and incumbent LECs are expanding their use of DSL service, cable modem providers are providing substantial competition to DSL offerings, and satellite companies are offering one-way nationwide broadband service. Moreover, emerging broadband providers are likely to furnish even more choices. High speed Internet access is being offered by major companies such as Sprint and AT&T, which are offering such services on a trial basis. Satellite broadband services are being offered by a variety of companies, and fixed wireless companies are using LMDS, 39 GHz and 24 GHz spectrum to provide broadband services. Further, MCI and Sprint have acquired MMDS licenses to transmit broadband, and other companies are providing broadband through the use of unlicensed spectrum.
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> The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies—xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services. *LMDS Order*, 15 FCC Rcd11,857, 11,864-11,865 ¶¶ 18-19 (released June 27, 2000).

The Commission's regulations on line sharing and line splitting, and the proposals in the FNPRM, are also inconsistent with the requirements of the 1996 Act and the Supreme Court's impairment analysis in *AT&T v. Iowa*. There is clearly no legal or public policy justification for a UNE data platform or wholesale unbundling of ILEC packet switching functionalities. In addition, the decision of the court of appeals in *GTE v. FCC* limits collocation of competitors' equipment on ILEC premises to equipment necessary for interconnection and access to ILEC UNEs. Any proposals to collocate multifunctional equipment like line cards on ILEC premises would be inconsistent with the court's ruling.

The financial, technical and operational impacts of mandatory, burdensome regulations on the ability of all ILECs to provide competitive services are real and costly. Regulations invariably result in the imposition of additional costs on those service providers who are regulated. Regulations may also impede the ability of a service provider to respond to changes in the marketplace. The selective imposition of costs and constraints on ILEC service provider's operations unquestionably gives competing, nonregulated, or less regulated, service providers competitive advantage over regulated competitors. Among smaller and rural ILECs, the costs of complying with the Commission's line sharing and line splitting regulations, and proposals in the FNPRM, are so onerous that they may spell the difference between limited or no deployment of innovative broadband services to remote and undeserved areas versus wide deployment of such services which the Commission and Congress have encouraged.

The Commission has stated that it is inclined "to intervene only if there is market failure or anti-competitive conduct and the record does not show that either of these factors exist," *LMDS Order*, 15 FCC Rcd at 11,865 ¶19 with respect to broadband competition.

USTA proposes that the Commission take no further action on broadband unbundling pending resolution of litigation involving prior Commission orders.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

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CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on March 13, 2001 a copy of *Reply Comments of the United States Telecom*, in CC Docket Nos. 98-147 and 96-98, was either hand-delivered or sent via U.S. Mail, first-class, postage prepaid, to the persons on the attached service list.

Gail Talmadge